

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE NEBRASKA  
PUBLIC SERVICE COMMISSION, ON  
ITS OWN MOTION, TO DETERMINE THE  
EXTENT TO WHICH VOICE OVER  
INTERNET PROTOCOL SERVICES  
SHOULD BE SUBJECT TO NEBRASKA  
UNIVERSAL SERVICE FUND  
REQUIREMENTS

Application No. NUSF-40/PI-86

**QWEST COMMUNICATIONS CORPORATION'S COMMENTS**

Qwest Communications Corporation ("QCC" or "Qwest") submits comments as directed by the Commission's Order Opening Docket, dated August 24, 2004, as follows:

***Introduction***

In response to the Commission's August 24, 2004 Order initiating the above captioned investigation to determine the extent to which Voice over Internet Protocol (VoIP) services should be subject to Nebraska Universal Service Fund contribution requirements, Qwest submits the following comments.

As a threshold response, Qwest recognizes the importance of sustaining, on a competitively neutral basis, the Nebraska Universal Service Fund. Qwest will abide by the Commission's determination of this matter until and unless federal or state law preempts, contradicts, or displaces this Commission's authority to regulate VoIP.

As the Commission noted in its Order Opening Docket in this matter, voice over Internet protocol, or VoIP, already has a significant presence in the Nebraska

telecommunications market. Of the many existing VoIP providers, only one has sought certification to provide VoIP, and only one has indicated it would collect and remit NUSF payments on its VoIP services.<sup>1</sup> Qwest believes there is good reason why VoIP providers have taken this course of action. VoIP is not a telecommunications service, but rather an interstate information service, and as such is not subject to traditional state regulation or NUSF charges.

The FCC and the courts are grappling with the jurisdictional nature of VoIP services. These proceedings find their roots in a long history of FCC precedents. Over twenty years ago, the Federal Communications Commission (“FCC”) held in its *Computer Inquiry* proceeding that subjecting “enhanced service” – “the precursor to today’s Internet” – to common carrier regulation would be unnecessary and counterproductive, no matter how extensive their communications components.<sup>2</sup> The FCC predicted correctly, that the development and availability of these services would best be promoted if regulatory rules and procedures were not “interjected between technology and its marketplace applications.”<sup>3</sup> In the Telecommunications Act of 1996, Congress codified the Commission’s holding through several measures. First, Congress adopted the FCC’s distinction between “basic” (*i.e.*, telecommunications) and “enhanced” (*i.e.*, information) services and chose to limit Title II regulation to the former.

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<sup>1</sup> This one carrier – Time Warner – made its submission to Commission jurisdiction and its commitment to collect and remit the NUSF surcharge conditional on the FCC’s determinations as to whether VoIP is a telecommunications or information service, and whether state commissions may exercise jurisdiction over VoIP services.

<sup>2</sup> Separate Statement of Chairman Michael K. Powell, *IP-Enabled Services*, WC Docket NO. 04-36, FCC 04-28 (rel. March 10, 2004).

<sup>3</sup> Final Decision, *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, 77 FCC2d 384, Para. 116 (1980) (“Computer II Final Decision”).

Second, Congress adopted in section 230(b)(2) as “the policy of the United States” that the “Internet and other interactive computer services [shall be] unfettered by Federal or State regulation.”

This statutory provision expands the FCC's statutory authority to adopt and implement federal policy respecting interstate telecommunications to include matters respecting the Internet—with the addition of an express directive to focus on a policy that is deregulatory in nature. The traditional presumption that state regulation of intrastate services will be preserved except when such regulation interferes with the FCC's regulation of interstate services that derives from the original 1934 Communications Act is not valid in the case of IP-enabled services, because the Act treats all Internet services in the same manner as it treats interstate services. A valid FCC policy regarding the Internet is presumptively binding on the states in the same manner as are FCC policies regarding interstate services, because regulation (or deregulation)<sup>4</sup> of the Internet is now entrusted to the FCC.

This statutory provision in turn leads to two separate conclusions: 1) State regulation of the Internet, including IP-enabled services, is prohibited by statute in the same manner as is state regulation of interstate services, and state regulators should accordingly refrain from interfering with or impeding the Congressional purpose that the Internet be free from both federal and state regulation. 2) State regulation in other spheres traditionally entrusted to state regulators is or will be preempted if the state regulation interferes with the FCC's valid policies in the realm the Internet—a preemptive power that must be analyzed under the same rubric as the FCC's

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<sup>4</sup> FCC preemptive policies do not need to be regulatory in nature. They can be deregulatory as well. See *Computer and Communications Industry Association v FCC*, 693 F. 2d 198, 217 (DC Cir. 1982), cert denied *sub nom Louisiana Public Service Commission v FCC*, 461 US 938 (1983).

preemption of state regulations that interfere with its regulation of interstate services. In other words, from a jurisdictional perspective, the 1996 Act directs the FCC to treat the Internet in the same fashion as it treats interstate services—the regulation and deregulation of the Internet is a matter entrusted to the FCC, and states have no jurisdiction in that federal sphere.

Qwest defines Voice over Internet Protocol (“VoIP”) as an IP-enabled service that originates in IP over a broadband facility, requires unique consumer premises equipment (“CPE”), and terminates in either IP or time division multiplexing (“TDM”). VoIP is simply one of numerous IP-applications that under the FCC’s existing rules as well as the Telecom Act of 1996 constitute an interstate, information service and not a telecommunications service. Qwest expects that some commenters may disagree and argue that VoIP is a telecommunications service. These arguments carry little weight, however, because whatever the FCC may have concluded, it is undisputed that the FCC has yet to classify VoIP as a telecommunications service. Accordingly, VoIP is not subject to the jurisdiction of state regulatory bodies, and the customers who use VoIP should not be required to contribute to the NUSF on their VoIP services. Against this background, Qwest offers the following responses to the specific questions posed in the Order Opening Docket:

**1. *Can the NUSF Surcharge only be assessed on telecommunications services?***

Yes. The Nebraska statutes governing the NUSF pervasively and repeatedly are expressly limited to “telecommunications services.” The very title of the act is the

"Nebraska **Telecommunications** Universal Service Act,"<sup>5</sup> indicating a focus on telecommunications services, not information or enhanced services. The stated purpose of Nebraska's Telecommunications Universal Service Act is to provide access to "telecommunications services at affordable prices."<sup>6</sup> NEB. REV. STAT § 86-323(4) declares as the policy of Nebraska to require "providers of telecommunications services" to make contributions to the NUSF – providers of information or enhanced services are not mentioned. Section 86-324(2)(d) limits the Commission's authority to require contributions to the NUSF to "telecommunications compan[ies]" – a term defined by § 86-322 as a person or entity offering "telecommunications service" for hire. Section 86-326 mentions only "telecommunications companies" as entities that could violate its obligations or the rules under the NUSF. In contrast, information services and enhanced services providers are given only scant statutory mention, and never in connection with the assessment of the NUSF surcharge. There is simply no statutory basis to assess the NUSF surcharge on anything but telecommunications services.

**2. *Can the NUSF surcharge be assessed on information services?***

No. As indicated above, Nebraska statutes limit collection of the NUSF surcharge to telecommunications services.

**3. *If the NUSF surcharge can only be assessed on telecommunication services, does VoIP service contain a portion or portions that is a telecommunication service subject to the NUSF surcharge?***

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<sup>5</sup> Neb. Rev. Stat. § 86-316 (emphasis added).

<sup>6</sup> Neb. Rev. Stat. § 86-317.

VoIP does not contain a telecommunications service that would be subject to the NUSF surcharge. Under the Communications Act, as amended in 1996, all IP-enabled services are appropriately classified as "information services," not "telecommunications services."

A "telecommunications service" as defined in the Act offers "the transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."<sup>7</sup> An "information service" offers "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."<sup>8</sup> The FCC has held that these terms have essentially the same meaning as "basic services" and "enhanced services" as defined by the Commission in its *Computer Inquiry* decisions.<sup>9</sup> IP-enabled services are classified as enhanced services under the *Computer Rules*,<sup>10</sup> and the nature of the Internet precludes any opportunity to sever some applications (such as the IP voice application) into discrete units that could be sub-classified as basic services irrespective of the overall enhanced nature of the entirety of the IP set of applications. Information/enhanced service are not common carrier services and are not regulated under Title II of the Communications

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<sup>7</sup> 47 USC Section 153(43) and (46).

<sup>8</sup> 47 USC Section 153(20).

<sup>9</sup> NPRM, paragraph 26; First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Telecommunications Act of 1934, as amended*, 11 FCC Rcd 21,905 (1996) ("*Non-Accounting Safeguards Order*").

<sup>10</sup> 47 CFR Section 702(a) defines enhanced services as "services offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."

Act.<sup>11</sup>

In the case of most IP-enabled applications, the information/enhanced service classification is readily apparent. All IP-enabled services convert information from one form to another, process, retrieve and store information, add protocol information, process protocols, and perform myriad other functions that constitute and identify information services. These functions are the essential elements of both information services under the Act and enhanced services under the *Computer Rules*. As far as we can determine, there is no desire to classify such traditional information/enhanced services as Internet access, remote data processing, information storage and retrieval, gaming, and similar computer-based services as common carrier telecommunications services.

The controversy arises in the area of IP-voice applications, because, for varying reasons, there is sentiment in some corners that these particular applications should be carved out from other IP-enabled services and treated as common carrier telecommunications services. Such an approach would not be realistic (that is, it would not reflect a proper comprehension of how the Internet works). Nor would it be consistent with the Act or the FCC's rules.

It should first be noted that, as is the case with all IP-enabled applications, proper classification of IP-voice depends on what the customer has purchased and what the customer perceives. The IP-voice applications enable a broadband customer to launch a voice communication over that broadband connection. IP-voice applications do not include efforts to change the regulatory status of a normal voice call by using IP

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<sup>11</sup> Id. "Enhanced services are not regulated under title II of the Act."

transmission technology in the middle of a call.<sup>12</sup> The voice application of Qwest's IP-enabled service, for example, requires an IP connection and unique CPE and uses the Internet Protocol and, through data processing, offers broadband subscribers voice capabilities, voice messaging, advanced call control, and a web browser-based dashboard for subscriber management of call handling and messages. Further, communications originated by a Qwest subscriber in the Internet Protocol that terminate to a customer on a circuit switched network are delivered to a gateway for conversion to the TDM protocol, thus including a "net protocol conversion" in the overall service offered to the customer.<sup>13</sup>

There are really two reasons why IP-voice applications are properly and necessarily classified as information/enhanced services. First, the applications themselves are, as is noted above, information services even if viewed in isolation. But more importantly, it is not possible to view IP-voice applications in isolation from the myriad of other IP-enabled services that are part of the overall IP package marketed to and used by the customer. Properly understood, IP-voice is "simply an application that is provided over a broadband network."<sup>14</sup> These applications, which are continuously increasing in number and diversity, include e-mail, instant messaging, web surfing, streaming video, gaming, data processing, data retrieval and more. A user may simultaneously be speaking to a relative, composing an e-mail message to a business

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<sup>12</sup> AT&T had claimed that the use of IP technology as a transmission technique changed a standard voice call into an IP-enabled service. The FCC rejected that claim. See *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004).

<sup>13</sup> The Commission has found that an end-to-end protocol conversion that enables an end user to send information into a network and have it exit the network in a different protocol "transforms" user information. *Non-Accounting Safeguards Order*, 11 FCC Rcd 21,905, paragraph 104.

<sup>14</sup> See *VOIP: The Opportunity and Challenges Ahead*, remarks of FCC Commissioner Kathleen Q. Abernathy, Michigan State University (Feb. 19, 2004).



associate, playing chess with a distant opponent and downloading information from a web site, all over the same broadband connection. Such a user would be launching commingled and indistinguishable packets over the Internet carrying payloads for each such application. Nothing in the Act requires or permits the isolation for purposes of regulatory classification of one of many technologically indistinguishable applications provided over a seamless communications infrastructure.

Some mention should be made of the oft-cited discussion of IP voice in the FCC's 1998 "Report to Congress."<sup>15</sup> In that Report, which is instructive but is not an order and does not constitute binding legal precedent, the FCC addressed the issue of the regulatory status of IP-voice applications, noting that, in some instances IP voice and traditional circuit switched voice services shared a number of common characteristics.<sup>16</sup> In the Report, the FCC opined that, when called upon to decide the issue of the regulatory status of IP voice applications, meeting all of the following criteria would result in the classification of an IP-voice application as a telecommunications service rather than as an information service: 1) a "holding out" as a provider of telecommunications service; 2) use of the same premises equipment (hand sets) as used in the use of traditional telephone service; 3) use of North American Numbering Plan numbers; and 4) transmission of customer information without net change in form or content. The normal IP-voice applications fit one, at most two of these criteria (North American Numbering Plan numbers are used and, at times, a provider of IP voice applications will market a service that resembles a telecommunications service).

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<sup>15</sup> *In the Matter of Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998) ("Report to Congress" or "Report").

<sup>16</sup> Report, paragraphs 88-89 discussing "phone-to-phone" IP telephony.

Because all true IP-voice applications require broadband (IP) customer premises equipment and transform the customer's information as sent and received, the Report to Congress accurately states the proper regulatory status of IP voice applications.

**a. *If so, what portions of which services?***

As noted above, VoIP is an IP-enabled application which rides over broadband facilities such as DSL or high-capacity loops. There is no portion of VoIP services, as defined above, which properly can be classified as a telecommunications service. Like other IP-enabled applications, however, VoIP does ride over a broadband facility which may be classified as a telecommunications service, e.g., DSL, or as an information service, e.g., cable modem service. DSL is considered an interstate telecommunications service, and as such is subject to federal USF contribution requirements. However, cable modem service is not subject to federal or state USF requirements.

**b. *Who is or would be the provider of these services?***

CLECs, ILECs, ICOs and IXC's, and even satellite providers provide broadband facilities over which VoIP and other IP-enabled services may ride. Cable providers offer cable modem service which the FCC recently classified as an information service governed by Title I of the 1996 Telecom Act. Also, ISPs may purchase facilities from telecommunications providers and package such facilities with Internet access and resell that package as dedicated Internet access ("DIA") to end users. DIA is also classified as an information service.

**c. *Who should be required to bill, collect, and remit the NUSF surcharge?***

As noted above, the current federal law and regulations associated with USF

apply only to telecommunications services and states are constrained by the scope of the federal law when creating and regulating their intrastate USF. Accordingly, telecommunications carriers providing intrastate telecom services are obligated to pay into the NUSF today. To the extent that the broadband transport over which a VoIP application rides is deemed an information service, e.g., cable modem, or is an interstate telecom service, e.g., DSL, then the providers of those services would not be obligated to pay into the NUSF.

Moreover, this question poses jurisdictional problems. Some VoIP providers, like QCC, are already certified as telecommunications carriers of either local or interexchange services and are otherwise subject to Commission jurisdiction and oversight.<sup>17</sup> Many other VoIP providers are not certified as telecommunications carriers of any kind, however, and are unregulated providers of Internet service or other enhanced services. For these other providers, the Commission lacks the jurisdiction or authority to compel any action. Even for presently certificated providers that provide VoIP services, the Commission lacks jurisdiction to regulate the information services or other enhanced services those providers sell.<sup>18</sup> Regardless, the current regulatory inequities could lead to a situation where only certificated VoIP providers would be subject to NUSF requirements, creating competitive inequities. These competitive inequities may well violate the statutory requirement that the NUSF be “competitively neutral.” NEB. REV. STAT. § 86-323(5). The most practical course of action to avoid

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<sup>17</sup> QCC is presently certified as an interexchange carrier, and has applied for authority as a competitive local exchange carrier. Its CLEC application is still pending.

<sup>18</sup> Tracking down VoIP providers and making sure all VoIP providers collect and remit the NUSF surcharge is an almost insurmountable task from both a jurisdictional and logistical perspective. For example, many VoIP providers do not even assign Nebraska area code and exchange numbers to their Nebraska customers.

these potential problems and inequities is for the Commission to wait until the FCC addresses the jurisdictional status of VoIP services, and then impose NUSF requirements the FCC permits, if any, upon all VoIP providers, regardless of whether those providers are currently certified telecommunications companies in Nebraska.

#### **4. Can the NUSF only be assessed on intrastate services?**

Yes, and more specifically, the NUSF can only be assessed on intrastate **telecommunications** services. The recent opinion of the 5<sup>th</sup> Circuit in *AT&T Corp. v. Public Utility Commission of Texas*, \_\_\_ F.3d \_\_\_ (5<sup>th</sup> Cir. 2004) ("*AT&T Opinion*") confirms this conclusion. As discussed in the *AT&T Opinion*, the Federal Universal Service Fund ("FUSF") is supported by a charge on all interstate telecommunications service providers:

**(d) Telecommunications carrier contribution**

Every telecommunications carrier that provides **interstate telecommunications services** shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.<sup>19</sup>

Congress empowered states to collect funds from carriers providing intrastate telecommunications services. As with the federal universal service scheme, state USF schemes must be equitable and nondiscriminatory. Moreover, state universal service plans can only apply to carriers that provide "intrastate telecommunications services" and cannot burden or rely upon the federal universal service system:

**(f) State authority**

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides **intrastate telecommunications services** shall contribute, on an

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<sup>19</sup> 47 U.S.C. § 254(d) (emphasis added).

equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.<sup>20</sup>

In the *AT&T Opinion*, the Texas PUC had required all providers of intrastate telecommunications services, through their customers, to contribute to the state USF. As to those carriers, however, the requirement applied to all revenue they derived from intrastate, interstate, and international calls originating in Texas. Thus, carriers that provided intrastate services along with interstate and multijurisdictional services were forced to contribute to both the FUSF and the Texas USF for interstate or multijurisdictional calls originating in Texas, while providers of interstate services only would not be required to contribute. The 5<sup>th</sup> Circuit concluded that such a scheme unfairly burdened providers of multijurisdictional telecommunications services compared to providers of interstate services only, and struck down the Texas PUC's USF funding scheme. A similar result would likely befall any ruling by this Commission that imposed USF contributions on providers of intrastate telecommunications services in Nebraska relating to revenue derived from interstate information services like VoIP.

**5. *If the answer to question 4 is yes, is a portion of the services used to provide VoIP an intrastate service? If so, what portions or services?***

As noted above, VoIP is an interstate information service. No portion of VoIP services properly can be classified as intrastate services.

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<sup>20</sup> 47 U.S.C. § 254(f) (emphasis added).

**6. *Is VoIP subject to Neb. Rev. Stat. §§ 86-316 through 86-329 either generally or in part; and if in part, which statutory section(s) applies?***

No. These provisions apply only to telecommunications services, and as noted above, VoIP is not a telecommunications service.

**7. *In the event VoIP services are provided by an NETC in an area that receives support, should those services, in some manner, be eligible as supported services?***

No. Just as NUSF contributions are limited to telecommunications services and telecommunications carriers (see response to Question No. 1 above), Nebraska statutes limit distributions of NUSF monies to telecommunications companies. Moreover, a provider of VoIP services could not be an NETC under NEB. ADMIN. RULE 4.01 *et seq.*, because VoIP providers are not telecommunications companies in that they do not provide any telecommunications service (unless those providers also provide a separate telecommunications service, like AT&T's traditional local and interexchange voice and data products, and the interexchange and proposed local voice and data services QCC seeks to provide). As such, existing law is properly neutral to VoIP services. VoIP should not contribute to or burden the existing NUSF, but rather exist outside the NUSF, just like other information and enhanced services.

This policy helps preserve the ability of the NUSF to fund services in an evolving telecommunications market. VoIP technology is new, but some have speculated that VoIP may largely replace traditional voice telephony over the next several years, and that if VoIP is not subject to the NUSF surcharge, the sustainability of the NUSF will be threatened. These concerns are not appropriate. First, no one can accurately predict the future of VoIP or other new technologies like WiMax, but if VoIP services are not

eligible for NUSF support, and if VoIP replaces traditional voice telephony, even though less money will be available to fund the NUSF in future years, there will be less demand for NUSF. Second, VoIP will not likely displace the many other telecommunications services that presently contribute to the NUSF – wireless, ATM, private line, ISDN, PRI, and many others – and as a result, the sustainability of the NUSF is not substantially threatened by VoIP.

## ***Conclusion***

As these comments were being drafted, news reports were circulating that an FCC order on VoIP jurisdiction is coming soon.<sup>21</sup> Whether “soon” means a period of days, weeks, or months, the most prudent course of action for the Nebraska Commission to take is to wait. There is no reason to rush into assessing NUSF surcharges on all VoIP services. The Commission has not even made any determination that it has any jurisdiction over VoIP services for any purpose, and it seems the applicability of NUSF surcharges to VoIP services is a difficult vehicle to resolve these difficult jurisdictional questions.

In such uncertain legal waters, the Commission, existing telecommunications companies, and uncertificated VoIP providers will all benefit from a patient, principled approach to regulating or imposing surcharges on VoIP services. Qwest therefore asks that the Commission indefinitely suspend these proceedings, subject to being reopened on the Commission’s motion only, should the Commission later determine that changes in the law warrant comment or input from Nebraska telecommunications carriers. In any event, however, Qwest believes the sustainability, on a competitively neutral basis, of the NUSF is important, and will abide by the Commission’s determination of this matter until and unless federal or state law preempts, contradicts, or displaces this Commission’s authority to regulate VoIP.

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<sup>21</sup> See, e.g., Telecommunications Reports Articles, copied and attached as Appendix A.



Dated November 1, 2004.

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